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No. 84-482

In the Supreme Court of the United States

OCTOBER TERM, 1984

KEITH H. GUSTAFSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's offenses relating to his participation in a large-scale marijuana distribution scheme may constitute "racketeering activity" within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961(1)(D).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 734 F.2d 1447.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1984. A petition for rehearing was denied on July 30, 1984 (Pet. App. 29-30). The petition for a writ of certiorari was filed on September 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 and 1962, are reproduced at Pet. 2.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiracy to violate the RICO statute, in

violation of 18 U.S.C. 1962(d) (Count 1); one count involving a substantive RICO offense, in violation of 18 U.S.C. 1962(c) (Count 2); and one count of conspiracy to possess and distribute marijuana, in violation of 21 U.S.C. 846 (Count 16). Petitioner was sentenced to concurrent terms of 12 years on count 1, ten years on count 2, and five years on count 16. In addition, he was fined a total of $35,000.[1]

1. The evidence at trial (see Pet. App. 2-3),[2] which is not in dispute, showed that from at least early 1977 and for several years thereafter co-defendant Tony Fernandez operated a large marijuana trafficking enterprise in Florida and other locations in the United States. Fernandez imported marijuana in multi-ton quantities. Co-defendant Robert Govern, the head of the domestic distribution network, purchased the marijuana from Fernandez and resold it to various buyers. Petitioner was one of Govern's employees. His responsibilities included receiving loads of marijuana at a stash house, paying the suppliers, weighing the marijuana, distributing it to Govern's customers, and receiving payments from them.

During late 1977 or early 1978 co-defendant Todd Reynolds obtained several hundred pounds of marijuana from Govern and petitioner. The marijuana was discovered and confiscated by law enforcement officers before Reynolds could pay for it. Reynolds then agreed to work for Govern to satisfy his debt, and petitioner was assigned to train Reynolds. In May 1978 petitioner and Reynolds went to southern Georgia to help distribute between 28,000 and

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[1]Petitioner was indicted with 12 other defendants. Co-defendants Govern, Mausser, Wilkerson, and Zielie were convicted on various counts of the indictment. One of the other defendants was acquitted, and the others either pleaded guilty or remained fugitives. Pet. App. 1 n.1.

[2]The description of the evidence at trial is taken from the government's court of appeals brief.

32,000 pounds of marijuana to Govern's customers. On several subsequent occasions Reynolds and petitioner accepted delivery of marijuana from Fernandez' employees at Govern's stash house in Loxahatchee, Florida. From June to November 1978, between 125,000 and 150,000 pounds of marijuana were received at the stash house and distributed to customers. Petitioner and Reynolds collected millions of dollars from Govern's customers and paid Fernandez' agents for the marijuana until mid-November 1978. Govern then decided that the sales proceeds would be collected and kept at another location.

Petitioner took a leave of absence from the operation in early 1979. He returned later in the year and again assumed his role in Govern's distribution network.

2. The court of appeals affirmed the convictions of petitioner and his co-defendants, with the exception of one conviction of co-defendant Govern as to which the court found insufficient evidence (Pet. App. 1-28). The court of appeals held, inter alia, that the new trial of petitioner and his co-defendants following a mistrial was not barred on double jeopardy grounds (*id.* at 16-18); that a communication from the trial court to the jury did not deprive petitioner of his right to be present at every stage of the trial (*id.* at 18-19); that the prosecutor's remarks during closing arguments did not deny petitioner a fair trial (*id.* at 19-20); that remarks made by counsel for one of petitioner's co-defendants did not constitute an adverse comment on petitioner's failure to testify (*id.* at 20-22); that there was sufficient evidence to establish the existence of an "enterprise" within the meaning of the RICO statute (*id.* at 23-26); that marijuana is a dangerous drug within the meaning of the RICO statute (*id.* at 23 n.11); and that the trial court did not err in denying petitioner's motion to sever (*id.* at 26-28).

ARGUMENT

Petitioner contends that marijuana offenses do not constitute "racketeering activity" within the meaning of the RICO statute, 18 U.S.C. 1961(1)(D). The court of appeals' conclusion to the contrary is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

The RICO statute, 18 U.S.C. 1962(c), makes it unlawful for any person associated with an enterprise engaged in interstate commerce to participate in the conduct of affairs of the enterprise through a pattern of racketeering activity. "Racketeering activity" is defined under 18 U.S.C. 1961(1) to include certain state felonies and enumerated violations of federal criminal laws, including "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States." Petitioner contends that the absence of any explicit mention of marijuana in this definition signifies an intent on the part of Congress to exclude marijuana violations from the class of offenses that may form the basis for a conviction under the RICO statute. Petitioner claims that his RICO convictions, which were premised on his involvement in a marijuana trafficking scheme, must therefore be reversed. That claim is without merit.

The RICO statute does not include any definition of the phrase "narcotic or other dangerous drugs" found in 18 U.S.C. 1961(1)(D). But there can be no real doubt that marijuana is a dangerous drug and that it was considered dangerous at the time the RICO statute was enacted; indeed, petitioner does not dispute this proposition.[3] The

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[3]Congress clearly viewed marijuana as a dangerous drug. In 1970, shortly after the RICO statute was enacted, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. 801 *et*

statute does not contain any express exclusion for marijuana. Thus, the plain language appears to indicate that felonies involving distribution of marijuana would qualify as predicate offenses under RICO.

Petitioner contends (Pet. App. 5-11) that the legislative history demonstrates a congressional intent to exclude marijuana offenses from the coverage of the RICO statute. He points in particular to the fact that some early drafts of the RICO legislation referred specifically to dealings in "narcotic drugs or marihuana" in defining the term "criminal activity," while the final legislation omitted the word "marihuana" and instead used the phrase "narcotic or other dangerous drugs" in defining "racketeering activity." The obvious purpose of this change was to *expand* the categories of illicit drugs within RICO's reach; accordingly, the most likely explanation for the change is that Congress viewed the reference to marijuana as surplusage once it added the "other dangerous drugs" language. The change in language therefore reinforces the conclusion that Congress believed marijuana to be encompassed within the category of "other dangerous drugs."[4]

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seq. That Act classified marijuana as a controlled substance and provided for substantial criminal penalties in connection with various marijuana-related activities. The fact that Congress did not provide for identical treatment of all controlled substances does not mean that it viewed some of those substances as nondangerous. Moreover, at that time the government agency charged with detection of marijuana offenses was called the Bureau of Narcotics and Dangerous Drugs (now known as the Drug Enforcement Administration). See 21 U.S.C. (1970 ed.) 802(4). Congress presumably was aware of both the agency's name and its jurisdiction at the time the RICO statute was enacted.

[4]Petitioner purports to find support for his position in Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. 2516(1)(e), enacted two years before passage of the RICO statute. Section 2516(1)(e) provides that interception of wire and oral communications may be authorized if it will yield evidence of, inter alia, any offense involving dealing in "narcotic drugs, marihuana, or *other* dangerous

The conclusion that Congress intended that marijuana violations would qualify as RICO predicate offenses is fully supported by the underlying purposes of the RICO statute. In enacting RICO, Congress made the express finding that organized crime derived a major portion of its power through money obtained from, inter alia, "the importation and distribution of narcotics and other dangerous drugs" and stated that the purpose of the new statute was the eradication of organized crime. Pub. L. No. 91-452, § 1, 84 Stat. 922, 18 U.S.C. 1961 note. Congress was well aware

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drugs" (emphasis added). That language simply reinforces the conclusion that Congress viewed marijuana as a dangerous drug.

Petitioner suggests (Pet. 8, 11) that Deputy Attorney General Kleindienst objected specifically to removal from the RICO statute of the reference to marijuana. In fact, Deputy Attorney General Kleindienst merely proposed to the Senate committee a definition of "racketeering activity" that would have included acts involving "narcotic drugs, marijuana or other dangerous drugs." See *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 405 (1969). Like the wording of Section 2516(1)(e) discussed above, the language proposed by Deputy Attorney General Kleindienst — at an early stage in consideration of the RICO legislation — supports the view that marijuana was generally regarded as within the category of dangerous drugs and that the reference to marijuana could properly have been deleted as surplusage.

Petitioner also notes (Pet. 8 & n.5) that Professor Blakey, who played a role in drafting the RICO statute, has suggested that Congress's omission of an express reference to marijuana from the final version of the RICO statute reflected a deliberate decision to exclude marijuana offenses from RICO coverage. Nothing in the legislative history documents such an intent on Congress's part. As we argue in the text, it seems far more likely that Congress regarded the reference to marijuana as surplusage. In any event, Professor Blakey's after-the-fact characterizations do not amount to evidence of a clearly expressed legislative intent that would displace other indications of congressional purpose. See *Albernaz* v. *United States*, 450 U.S. 333, 336 (1981).

that organized crime figures were active in marijuana trafficking. For example, in 1967 Lawrence Fleishman, Assistant Commissioner of the Bureau of Customs, testified that "[t]he narcotics and marihuana traffic is the single area in which the involvement with organized crime is the greatest." *The Federal Effort Against Organized Crime:Hearings Before a Subcomm. of the House Comm. on Government Operations*, 90th Cong., 1st Sess., Pt. 2, at 239 (1967). In those circumstances, it is difficult to escape the conclusion that Congress intended to include marijuana trafficking offenses within the sweep of the RICO statute. That conclusion is particularly appropriate in view of Congress's express statement that the RICO statute "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947, 18 U.S.C. 1961 note. See *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 10-12; *United States* v. *Turkette*, 452 U.S. 576, 588-589 (1981). The purposes of the RICO statute are clearly furthered by the holding that the statute extends to offenses relating to the sort of massive marijuana trafficking operation involved in this case.[5]

Petitioner acknowledges (Pet. 14-16) that no court of appeals has held that marijuana violations may not constitute predicate offenses for purposes of the RICO statute. The only other court of appeals that has addressed a claim

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[5]Petitioner offers several hypothetical situations — far removed from his own extensive marijuana trafficking activities —involving the sharing of a minimal amount of marijuana by persons involved in a legal association and suggests that application of the RICO statute to such situations would be inappropriate. See Pet. 11-13. It is doubtful that the activity petitioner describes would fall within the definition of "racketeering activity," which covers only drug offenses that constitute felonies. Moreover, the application of RICO in such circumstances would be equally infelicitous if the drug being shared were some other dangerous non-narcotic drug, such as methamphetamine, instead of marijuana.

like petitioner's has rejected it. See *United States* v. *Phillips*, 664 F.2d 971, 1039-1040 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982). Petitioner complains that the court below did not make an independent examination of such claims because it regards *Phillips* as binding precedent that cannot be overturned except by the Eleventh Circuit sitting en banc. However, petitioner himself requested en banc consideration of his claim, and the Eleventh Circuit denied his petition without dissent (Pet. App. 29-30). See also *United States* v. *Bascaro*, 742 F.2d 1335, 1342-1343 (11th Cir. 1984). Thus, the Eleventh Circuit has had a full opportunity to consider the advisability of its adherence to *Phillips* and has chosen to continue that adherence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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